(10)

No. 87-1167

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

PRICE WATERHOUSE,
Petitioner,

v.

ANN B. HOPKINS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 90 national and international labor organizations having a total membership of approximately 13,000,000 working men and women, with the consent of the parties as provided for in this Court's rules.

SUMMARY OF ARGUMENT

This proceeding, contrary to Price Waterhouse's contention, is a relatively straightforward mixed motive case under Title VII of the Civil Rights Act of 1964, 432 U.S.C. § 2000e et seq.: the district court's findings, reviewed and approved by the court of appeals, establish

that sex-based considerations were given significant, negative weight in the promotion review process which led to denying plaintiff a partnership.

The issue directly before this Court concerns the placement and the nature of the burden of proof on the question whether the disadvantage the plaintiff suffered in the promotion evaluation process in the end made a difference in producing the decision to deny her a partnership. As Price Waterhouse recognizes, however, it facilitates analysis first to delineate the necessary components of a Title VII cause of action.

1. The language and structure of both of the principal substantive sections of Title VII, §§ 703(a)(1) & (2), as interpreted in this Court's cases, convincingly support the conclusion that an employee evaluation system biased against women violates Title VII without regard to the precise impact of that bias on each particular decision. The "because of . . . sex" language in those sections of the statute does not indicate otherwise; that language is best read as requiring that a discriminatory consideration be *a* basis for the challenged employment practice; when that practice is a decision-making process that weighs gender as a negative consideration, the requisite motivational element is self-evident.

2. This construction of Title VII comports with and is essential to further the statute's basic policies. Title VII's high purpose is to assure that discriminatory factors do not play a role in the distribution of benefits and privileges in the workplace. It is self evident that permitting employers to incorporate sex-based factors in their decisionmaking process as long as no determinative impact on any particular employment decision can be proven frustrates that purpose.

3. This Court's cases in analogous areas support the conclusion that a cause of action for violation of a rule requiring a fair and even-handed decision-making process

can be made out without demonstrating that the tainted aspect of the process in fact accounted for the negative decision. Where such causes of action are recognized, the issue of the connection between the impermissible aspect of the process and the result becomes a problem at the relief but not the liability stage; once liability for an illegal decision-making process is established, the burden of proof as to whether the same result would have occurred through a proper system is placed on the defendant.

4. Nothing in contemporary tort law regarding causation detracts from the foregoing analysis. Rather, modern tort doctrine in large part parallels that analysis, by recognizing liability whenever culpable conduct is a "substantial factor" in bringing about the harm protected against, by focussing on policy questions in defining that harm and the requisite causal connection to the culpable conduct, and by shifting to the defendant the burden of proof as to causation when it is unfair, on policy grounds, to place that burden upon innocent plaintiffs.

5. Once it is established that an employer commits a Title VII violation by following a biased decision-making process, the conclusion that the burden falls upon the employer to avoid make whole relief in a particular case by proving that there was no economic injury traceable to its illegal act follows *a fortiori*. As the party that created both the risk that a discriminatory factor would be determinative and the risk that the precise impact of such a mental factor would be very difficult to reconstruct after the fact, it is appropriate, as this Court has held in analogous cases, to place the risk of an error in the judicial fact-finding process upon the wrongdoer. Moreover, while this Court has not previously explicitly so held, as a practical matter decision-makers have recognized that given the hypothetical and psychological nature of the issue at the relief stage, it is appropriate to insist that the employer meet its affirmative burden through

objective, reliable kinds of evidence, and to require as well that the likelihood that the illicit factor affected the result be very small. A "clear and convincing" evidence standard captures and succinctly states those requirements.

ARGUMENT

Introduction

(a) The defendant Price-Waterhouse, an accounting firm, has a collegial decision-making system for admitting employees to the partnership. The district court found that this system gave substantial weight to "comments influenced by sexual stereotypes" and in that way "inject[ed] stereotyped assumptions about women into the selection process." Pet. App. 57a, 58a. That court concluded that "the Policy Board's decision not to admit the plaintiff to partnership was tainted by discriminatory evaluations;" the employer's decision was the "direct result" of "the maintenance of a system that gave weight to such biased criticisms" and "that made evaluations based on 'outmoded attitudes' determinative." Pet. App. 56a, 58a-59a.

Price Waterhouse argues that the district court's findings are insufficient to demonstrate that sex-based considerations played any role at all in the decisional process that produced the promotion decision adverse to the plaintiff. According to the employer "the only evidence of 'mixed motives' was the presence of an intuitively divined element of sexual stereotyping in the atmosphere." Pet. Br. at 43.

The district court's conclusion that the decision at issue here was infected by sexual stereotyping was not "intuitively divined", but was based instead on consideration of the evidence before that court. The court of appeals reviewed at length (Pet. App. 10a-17a) the evidence supporting that conclusion, noting that the district court's finding was based upon not only the expert evidence on

sex stereotyping but also upon the comments made about the plaintiff herself and about other women candidates for partnership as part of the evaluation system. Based upon that review, the court of appeals concluded that the district court's finding in this regard was not "clearly erroneous", since "there is ample support in the record for the District Court's finding that the partnership selection process at Price Waterhouse was impermissibly infected by stereotypical attitudes towards female candidates." Pet. App. 12a, 17a. The court of appeals therefore performed properly its task of reviewing the district court's factual findings in this regard. *Anderson v. City of Bessemer*, 470 U.S. 564 (1985); *Pullman Standard v. Swint*, 456 U.S. 273 (1982).[1]

The district court found, moreover, that sex stereotyping was not simply "in the atmosphere" but *in Price Waterhouse's promotion system*, and that this stereotyping had a "direct" impact on the negative evaluation of the plaintiff for partnership. Again, the court of appeals reviewed this finding carefully (Pet. App. 20a), and concluded that while the plaintiff "has not demonstrated the *exact* impact that stereotyped comments had on the Board's ultimate decision", there was "ample support for [the district court's] conclusion that stereotyping played a *significant role* in blocking plaintiff's admission to the partnership." Pet. App. 20a (emphasis supplied). Whether the court of appeals was correct in this regard or not presents, once again, only a question of the adequacy of the court of appeal's review of the district court's fact findings. And, once again, it appears that the court

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[1] While we address the point we note that the propriety of the court of appeals' review of the district court's factual findings is a question not fairly encompassed within the question presented for review (Pet. Br. I), and one with which this Court in any event rarely concerns itself. *Graver Tank & Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice*, 347 (1986).

of appeals proceeded properly with respect to this factual review issue.

(b) Thus, despite Price Waterhouse's protestations to the contrary (Pet. Br. at 42-50), as the court of appeals recognized this is "a case of mixed motivation [because] . . . [t]he District Court simply found that *both* plaintiff's personality and the sexually stereotyped reactions to her personality were significant factors in the firm's decision to hold her candidacy." Pet. App. 25a (emphasis supplied). As the proceeding comes to this Court, the critical finding of the district court, affirmed by the court of appeals, is that because of her sex, plaintiff was evaluated less favorably than she would have been on the basis of her personality standing alone.

That being so, the point of controversy here concerns whether the less-favorable-evaluation-on-the-basis-of-sex component of Price Waterhouse's decision-making process was sufficient to make the difference between a partnership offer and the "hold" that actually occurred. Indeed, the parties have focussed on where the burden of persuasion lies with respect to that point and the nature of that burden.

However, as Price Waterhouse recognizes (Pet. Br. at 21), in order to resolve that controversy, it is necessary first to determine the basic parameters of a viable Title VII cause of action. In order to know who has what burden of persuasion here one first has to know whether a showing that an employer maintains a selection process that in some respect is biased against women, and subjects women to that process, makes out a violation of Title VII. Price Waterhouse argues that such a showing is not sufficient; according to the employer, Title VII focusses only upon the employment decision ultimately made, and does not concern itself with the fairness of the process through which that decision is made. Pet. Br. at 20-27. This contention is simply incorrect. And not surprisingly Price Waterhouse's proposed answer to the analytically separate

question as to the relevance of proof that any sex differentiation in the evaluation process did not cause the plaintiff any economic loss—which rests on the employer's false premise—is incorrect as well.

(c) As we understand Price Waterhouse's position, the employer would agree that the plaintiff has made out a Title VII case where an illegitimate consideration is one of several reasons for an employment decision *as long as that reason was determinative*, either independently or in combination with other, legitimate reasons.

Thus, for example, if an employer were considering three employees for discharge due to economic conditions —a woman who was a fully competent employee, a woman who was not a fully competent employee, and a man who was the least competent employee of the three—and discharged the less competent of the two women, Price Waterhouse would agree that a finder of fact could infer that the employer had "mixed motives"; the employer did not regard being a woman alone as sufficient for discharge, but the employer did treat being a woman as a negative consideration in the evaluation process. Since it is clear that it was "because of" that negative consideration—her gender—(although also because of her lack of competence) that the less competent of two women was discharged, Price Waterhouse would recognize that Title VII had been violated. *Cf. Phillips v. Martin Marietta Co.*, 400 U.S. 542 (1971) (*per curiam*).[2]

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[2] In light of the argument made by Price Waterhouse with regard to the burden of persuasion issue presented here (Pet. Br. at 29-36), it is important to note that the situation delineated by this example is quite separate from one in which the claim that there is a nondiscriminatory reason for the discharge (or for any other employment decision) is pretextual.

A pretextual explanation is, as this Court has explained, one which is "a coverup". *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973). *See also*, Webster's *New World Dictionary* 1127

This case (like most mixed motive cases) presents a more complex variant of the hypothetical situation just discussed. In this case the district court found that Price Waterhouse has set up an evaluation system which considers not two considerations but many in deciding upon promotions; that gender is included in that set of considerations as a negative factor of "significant" weight; and that since the system is a qualitative one leaving ample room for informed discretion, it is not possible to quantify the effect of gender in any particular situation. And contrary to our hypothetical, in a case like this it is not possible to determine the precise impact of the gender consideration simply by comparing otherwise similarly situated individuals; the pertinent considerations are too complex, as indicated by the district court's conclusion that the plaintiff had not identified any men sufficiently similar to her in all pertinent respects to serve as an ap-

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(2d College Ed.) (defining "pretext" as "a false reason or motive put forth to hide the real one, excuse" and as a "coverup; front"). The concept of "pretext" thus concerns an alleged dissonance between an employer's explanation of his motives and his motives in fact.

In a mixed motive situation, the nondiscriminatory motive may be pretextual or not, depending upon whether the employer also acknowledges the illegitimate, discriminatory motive. If, in the above example, the employer insisted that his only criteria for discharge was incompetence, that would be a pretextual explanation, since an incompetent man was retained. If, on the other hand, the employer acknowledged his true mixed motives, there would be no pretext. The employer would, however, be liable, even on Price Waterhouse's theory in this case, although the nondiscriminatory motive was not pretextual and was itself another determinative reason in making the discharge decision.

In short, the problems of pretext and of mixed motivation have little to do with each other. Cases dealing with pretext (*e.g.*, *McDonnell Douglas, supra*, and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981)) concern the determination of what the employer's motivation really was, while the mixed motive problem arises only once that determination is made and concerns the propriety of liability and of relief once the facts are established.

propriate test of the impact of gender upon the promotion decision. Pet. App. 49a.

It is nonetheless true that, in this case as in our hypothetical, the employer treated gender as a negative consideration in the process of making an employment decision, and in that sense based its evaluation upon an illegitimate consideration.[3] And it is also undeniable that the employer by doing so has created a situation in which there is a *significant risk* that discriminatory considerations will in fact be determinative in particular situations, a risk that would be absent if only legitimate factors were considered in making promotion decisions.

Price Waterhouse's fundamental position in this case proceeds from the premise that an employer is free to employ such a tainted decisionmaking system, and is not open to a Title VII suit by a woman (or a group of women) subject to the system to enjoin its operation on the ground that the system as such violates Title VII. Pet. Br. at 27-28. According to the employer, only if the sex-based consideration embedded in the decisionmaking process were proven by the plaintiff in a particular case to have played a "decisive role" in a specific employment decision with adverse economic consequences would Title

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[3] Again, a hypothetical example may clarify this point. Price Waterhouse might have instituted a more formal evaluation system, providing for point rankings of the various candidates, based upon different point values for different relevant qualities. If the employer assigned a number of negative points for being a woman, the impact would be basically the same as the sex stereotyping in this case; the only difference would be that the impact would be precisely measurable, because the entire system would be based on quantifying considerations. *Cf. Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 262 n.7 (1979); *Regents of University of California v. Bakke*, 438 U.S. 265, 267-77 (1978). In that hypothetical, as in this case, gender would be a negative, although not necessarily a determinative, factor in every evaluation of a woman, and the employer would be basing its evaluation upon both legitimate and illegitimate factors.

VII be violated. Pet. Br. at 29; *see also id.* at 23; Brief of the United States as Amicus Curiae (Gov. Br.) at 9-10. There is no basis for this position under Title VII, as we now show.

I. Title VII's Language

Section 703(a)(1) of the Act, 42 U.S.C. 2000e-2(a)(1), forbids "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin." As this Court recently held,

> The phrase "terms, conditions, or privileges of employment" evinces a congressional intent " 'to strike at the entire spectrum of disparate treatment of men and women" in employment.' *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978). [*Meritor Savings Bank v. Vinson*, —— U.S. ——, 106 S. Ct. 2399, 2405 (1986).]

Just as "a hostile or offensive environment for members of one sex is [an illegal] arbitrary barrier to sexual equality' " and therefore an illegal "condition of employment" (*Meritor Savings Bank v. Vinson*, 106 S. Ct. at 2406, *quoting Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)), so the requirement that an employee submit to a decisionmaking process that treats men and women disparately on the basis of their gender and subjects women but not men to an added risk of an adverse outcome is, in and of itself, an unlawful condition of employment.[4]

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[4] That the statute proscribes "discriminating . . . *with respect to*" employment reinforces the conclusion that Congress intended to reach not simply the end-result of decisionmaking processes but those processes themselves. Creating a promotion system that is less favorable to women assuredly discriminates against women "with respect to" promotion, even if it is not possible to trace any particular promotion decision to the sex-based aspect of the promotion evaluation process.

Even more clearly, the other pertinent substantive section of Title VII, § 703(a)(2), 42 U.S.C. § 2000e-(2)(a)(2), reaches employment decisionmaking that relies upon a sex-based factor as a negative consideration. That section makes it unlawful for employers to

> limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, race, or national origin.

Quite evidently, § 703(a)(2) in terms proscribes decision-making processes that disadvantage women by placing a negative weight on femaleness. Such a process, as we have already seen, "tends to deprive [women] of employment opportunities . . . because of sex" by creating a higher risk for women than for men that employment opportunities will be denied. As this Court stated so emphatically in one of its earliest Title VII cases:

> The objective of Congress in the enactment of [this section of] Title VII is plain from the language of the statute. . . . It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of [male] employees. . . . What is required by Congress is the removal of artificial barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications. [*Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971).]

It is because Congress was concerned not simply with the end-result of employment decisions but also with *purging the employment decisionmaking process of sex-based and (race-based) considerations* that "[t]he statute speaks not in terms of jobs and promotions, but in terms of *limitations* and *classifications* that would deprive any in-

dividual of employment *opportunities.*" *Connecticut v. Teal*, 457 U.S. 440, 448 (1982) (emphasis in original).[5]

In addition, § 703(a)(2) proscribes practices that do not adversely affect any particular employment opportunity, but that do "adversely affect [a women's] . . . status as an employee." To apply an evaluation process that gives weight to sex stereotypes adversely affects a woman's status in the workplace simply by giving credence to those negative stereotypes, much as mantaining race-segreated bathrooms in a workplace would do. In this instance, as in many others, the evaluation process resulted not only in a decision—to place the plaintiff on "hold" with respect to partnership—but also in written and oral statements regarding the plaintiff's strengths and weaknesses as an employee. Sex-stereotyping statements "adversely affect [a women's] status as an employee" even when the decision is favorable—and assuredly do so when the decision is unfavorable—by conveying to fellow employees and to managers a gender-tainted view of the individual's worth as an employee.

The foregoing reading of §§ 703(a)(1) & (2) is not altered in any way by the fact that Title VII provides that, to act unlawfully an employer must act "because of such individual's . . . sex." That phrase does not require that a sex-based (or race-based) consideration "cause" an adverse employment decision in the same sense

[5] *Griggs v. Duke Power Co., supra,* and *Connecticut v. Teal, supra,* were both disparate impact cases. But it is plain that Congress in enacting Title VII was equally interested in rooting out barriers to equal opportunity that are not directly sex-based but have a disparate impact upon members of one gender and decision-making processes that place women at a disadvantage on directly gender-based grounds. Put another way, if the tests at issue in *Griggs* and *Teal* had deducted five points from the grade of every woman, there would have been no dispute, we suspect, as to whether those tests were invalid as tending to deprive women of employment opportunities; only because there was no such explicit link to a proscribed classification was there a cognizable argument on the employer's side.

that a physical act "causes" a physical injury. As a literal matter, and as a matter of human psychology, an employer who takes action that is in part premised upon a sex-based consideration and in part premised also upon a legitimate consideration, has acted "because of . . . sex" (although because of other reasons as well). The employer's action is "on the basis of" and "takes into account" sex as a factor that has been accorded some weight in reaching the decision to act. Given the limits on our knowledge of the wellsprings of human action it is difficult—if not impossible—to give more content to the concept of a discriminatory motive.

In sum, the statutory words demonstrate that "it would be unlawful for defendant to put [an employee] at a disadvantage in the competition for promotion because of [sex], as well as to actually deny . . . the promotion for this reason." *Bibbs v. Block*, 778 F.2d 1318, 1321 (8th Cir. 1985).[6] Under this approach, because the unlawful employment practice is the flawed decisionmaking process itself and not simply its particular results, any causal requirement runs between the unlawful motivation and the process, and not between the unlawful motivation and the *ultimate decision.*[7] And that link is in mixed motive

[6] *See id.* at 1323 for a list of federal court of appeals cases adopting basically this same analysis of the substantive reach of Title VII. *See also,* for a commentary that many of those cases found persuasive on this question as well as on the others in this case, Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action,* 82 Columbia L. Rev. 292 (1982).

[7] So, for example, "if an employer requires black employees to meet a higher standard [than whites to get promoted], the statute is violated even if [the blacks] actually meet [the higher standard] and get the jobs in question." *Bibbs v. Block,* 778 F.2d at 1321-22; *see also, e.g., King v. Trans-World Airlines, Inc.,* 738 F.2d 255, 259 (8th Cir. 1984) (an interview process that asks women questions not asked of men violates Title VII even if the defendant has legitimate reasons for not hiring the plaintiff).

It is worth noting as well that in cases like this one, causation in the sense we use that term in regard to physical acts is ordinarily

cases almost always self-evident, since the discriminatory evaluation process is by definition one made discriminatory by the very fact that the employer *took or is taking sex-based considerations into account and is giving those considerations a negative weight in its decisionmaking.* It is therefore simply untrue that the foregoing reading of Title VII "make[s] illegal the existence of discriminatory thoughts and expressions," "prohibit[s] discrimination 'in the air' ", or "impose[s] liability for discriminatory animus without more". Pet. Br. at 21; Gov. Br. at 9.[8]

II. Title VII's Policies

Title VII's basic purpose is not simply to compensate individuals for economic losses due to proscribed discrimination, but "to eliminate . . . discrimination in employment based on [the proscribed factors]." H. R. Rep. No. 914, 88th Cong., 1st Sess. 18 (1963). For this reason, the concept of illegal discrimination incorporated in the Act seeks to end *any* use of the proscribed consideration factors in making employment decisions. As one of the floor managers of the bill explained:

> To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions in treatment or favor which are prohibited by

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not in dispute. For example, on the facts in this case as found by the district court, the employer's conduct certainly caused Hopkins to be subjected to a discriminatory promotion evaluation system, and to be rejected for partnership pursuant to that system. The question is not *whether* the defendant caused Hopkins injury, but why, *viz.*, with a motive forbidden by the statute, or with a legal motive.

[8] For the reasons stated in the text, it is also plain that the legislative history quoted in support of the proposition that Title VII does require a causal connection between an unlawful motive and a proscribed employment practice (Pet. Br. at 24-26; Gov. Br. at 8-10) does not advance the inquiry. For we too recognize the need for a causal link; the dispute is over the nature of that link, and the quoted congressional statements do not speak to that dispute.

> section [703] are those which are based on any . . . of the forbidden criteria: race, color, religion, sex, and national origin. . . . The bill simply eliminates consideration of color [and other proscribed criteria] from the decision to hire or promote. [110 Cong. Rec. 7213, 7218 (1964) (remarks of Senator Clark). See also, e.g., 110 Cong. Rec. 13088 (1964) (remarks of Senator Humphrey).]

Consistent with this legislative history, this Court has repeatedly stressed that:

> the primary objective [of Title VII] was a prophylactic one . . . [to] 'provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history. [*Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975).]

See also Griggs v. Duke Power Co., supra, 401 U.S. at 429-30; *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 93 (1981); *EEOC v. Associated Dry Goods Corp*, 449 U.S. 590, 595 (1981); *Teamsters v. United States, supra*, 431 U.S. at 324, 357-364.

The reading of Title VII we suggest forwards the fundamental "prophylactic" purpose of the statute: employment decisionmaking free of the proscribed discriminatory considerations. In contrast, on Price Waterhouse's view of the statute, employers are free to violate that norm with impunity in a large number of instances, becoming liable even for injunctive and declaratory relief only where the plaintiff succeeds in demonstrating that a proscribed discriminatory consideration was determinative (although not necessarily solely determinative) in a particular employment decision. Such an approach, far from encouraging employers to "self-examine and self-evaluate their employment practices" (*Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 417), encourages continuation of the more subtle forms of employment discrimination.

Indeed, the result of such tainted decisionmaking processes is twofold: First, women and minorities are discouraged in pursuing career opportunities, simply by reason of being treated disparately from, and more harshly than, their fellow workers. And second, there are certain to be numerous instances in which the proscribed discriminatory consideration embedded in the decisionmaking process was in fact determinative, but in which the difficulty of reconstructing the employer's decisionmaking process with sufficient precision to prove that impact proves insurmountable. It is undoubtedly for these very reasons that Congress in enacting Title VII created a cause of action for gender-biased decisionmaking on employment matters.[9]

III. Analogous Cases In This Court

The reading of Title VII suggested above is further buttressed by this Court's approach in cases arising under the Constitution, and under the National Labor Relations Act.

This Court has recognized first of all that the claim that a decisionmaking process does not meet applicable constitutional standards is sufficient to state a cause of action, and that questions relating to the connection between that flawed process and the decision actually made are matters that go to remedy, not liability.

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[9] In this case, the district court found that sex stereotyping was not simply "a" factor in Price Waterhouse's decisionmaking process but a "*significant*" factor in that process. Pet. App. 25a. It is thus not necessary in order to affirm the decision below for this Court to decide whether *any* reliance on gender-based decisionmaking creates liability under Title VII, or whether there is room for a *de minimis* rule.

We hasten to add that it is common ground that it is *not* sufficient to demonstrate simply that one or more of the individuals in a decisionmaking capacity harbors discriminatory views; some factual basis for inferring that those views were given operative weight with regard to an employment decision is necessary.

For example, in *Carey v. Piphus*, 435 U.S. 247 (1978), while "[t]he District Court held that . . . [plaintiffs] had been suspended without procedural due process," there was no finding as to whether the plaintiffs would have been suspended if procedural due process had been accorded. *Id.* at 251-53. The Court, proceeding on the premise that liability had been established, approved a lower court ruling that " 'if [the defendants] can prove on remand that [the plaintiffs] would have been suspended even if a proper hearing had been held,' " then no damages for injuries caused by the suspension would be available. *Id.* at 260.[10] The Court added, however, that "persons in [plaintiff's] position might well recover damages for mental and emotional distress caused by the denial of procedural due process" (*id.* at 262), and held that because "the fact remains that [plaintiffs] were deprived of their right to procedural due process," nominal damages are available even if no actual damages could be proven (*id.* at 266-67).[11] *See also Memphis Community School District v. Stachura*, —— U.S. ——, 106 S. Ct. 2537 (1986) (*Carey* principles apply to employment decisions impermissibly taking into account First Amendment activity). *Cf. LeBoeuf v. Ramsey*, 503 F. Supp. 747 (D. Mass. 1980).

Similarly, in *Mt. Healthy School District v. Doyle*, 429 U.S. 274 (1977), the Court, after recognizing that a school teacher was discharged in part because of his "communication [to a radio station] protected by the

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[10] The lower courts had granted injunctive and declaratory relief (*id.* at 252); it is permissible to grant such relief, of course, only after liability has been established.

[11] The *Carey* Court identified the interests served by the constitutional due process requirement to be somewhat similar to those discussed above with regard to a Title VII violation for gender-tainted decisionmaking: "to convey to the individual a feeling that the government [in this instance, the employer] has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." *Id.* at 262.

First and Fourteenth Amendments," (*id.* at 284), indicated that it was sufficient to establish a constitutional violation for the plaintiff to demonstrate that the communication "was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the Board's decision," (*id.* at 286-287).[12] The Court then turned to the separate remedial question of whether "Doyle is entitled to reinstatement with backpay;" *viz.*, to the question of whether there was a "constitutional violation *justifying remedial action.*" *Id.* at 284, 285; emphasis added. And the Court concluded that the normal reinstatement with backpay remedy would not follow from the constitutional liability if—and only if—the defendant demonstrated that the unconstitutional decisionmaking process was not responsible for plaintiff's loss of his job; *viz.*, that the plaintiff would have been discharged in any

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[12] The *Mt. Healthy* Court did not spell out the underlying reasons for describing the elements of the constitutional cause of action in this way. However, a few years before, in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), this Court had explained the relationship between the First Amendment and public employee discharges for free speech:

> [E]ven though a person has no 'right' to a valuable government benefit for any number of reasons, there are some reasons upon which the government may not rely. . . . For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

The essence of the constitutional violation alleged in *Mt. Healthy* was that the School Board has acted upon one of those "reasons upon which the government may not rely." Once this was proven, under *Perry* the plaintiff had established a constitutional wrong. *See also Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977) (decided the same day as *Mt. Healthy*) (because "racial discrimination is not just another competing consideration", "proof that a discriminatory purpose has been a motivating factor in the decision" is sufficient "proof of racially discriminatory intent or purpose" to show "a violation of the Equal Protection Clause.")

event. *Id.* at 287.[13] *See also Givhan v. Western Line Consolidated School District*, 439 U.S. 694, 416 (1979) (referring to the *Mt. Healthy* burden-shifting rule as dealing only with the question when "a public employee must be reinstated"); *Regents of the University of California v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (Opinion of Powell, J.).

This Court has in addition approved a similar approach under the National Labor Relations Act. *NLRB v. Transportation Management Co.*, 462 U.S. 393 (1983), reviewed an NLRB construction of § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), the section proscribing "discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." Under § 8(a)(3) as construed by the NLRB and approved by this Court, "to establish an unfair labor practice the General Counsel need show by a preponderance of the evidence only that a discharge is in any way motivated by a desire to frustrate union activity." 462 U.S. at 398-99. An unfair labor practice is established if the employer in its decisionmaking process gives negative weight to the consideration that an individual is a union adherent. The Board then permits the employer to establish as an "affirmative defense"—*viz.*, as a basis for avoiding liability based upon a consideration other than failure to prove the cause of action (C.A. Wright & A.R. Miller, *Federal Practice and Procedure: Civil* § 1270 at 289-92 and § 1271 at 313-16)—that the employer would have taken the same action absent the illegal motivation, and thereby to avoid a coercive order.

While permitting this "affirmative defense"—burden shifting approach, the Court made clear that the burden

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[13] Of course, as *Memphis Community School District v. Stachura supra*, was later to confirm, even if there were no reinstatement or back pay available, nominal and, where appropriate, actual compensatory damages for the constitutional violation would still lie.

shifts to the employer only *after* all the elements of an unfair labor practice—*viz.*, after the factors necessary to establish that "[t]he employer is a wrongdoer"—have been made out. 462 U.S. at 401-02. And the Court approved this approach as a permissible variant upon an alternative the Board was also free to adopt; *viz.*, the alternative of providing some relief, but not reinstatement and backpay, where the unfair labor practice was proven but the employer could demonstrate that the charging party was not economically injured thereby. *Id.* at 402.[14]

IV. The Common Law of Causation

Contrary to the argument pressed by the United States (Gov. Br. at 10-16), the construction of Title VII we advocate is in no way at odds with modern concepts of

[14] The Board, of course, has wide discretion in determining what remedies, if any, to provide once an unfair labor practice has been adjudicated. *See NLRB v. Food Store Employees Local 347 (Heck's, Inc.)*, 417 U.S. 1, 8 (1974). In approving the "affirmative defense" approach as an alternative to providing at least some remedy for an adjudicated unfair labor practice, the Court in *Transportation Management* did not deal with the matter *de novo* but rather recognized the wide berth the NLRB is accorded in the area of remedying unfair labor practices.

It was our view, when *Transportation Management* was decided (*see* Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in *Transportation Management*, at 12-21) and remains our view, that to refuse to provide *at least prospective relief* once it has been determined that an employer "is a wrongdoer" under the NLRA does not forward that statute's purposes.

Under Title VII, unlike the NLRA, the Court is not reviewing an administrative agency's construction of a statute but is construing an enactment in the first instance. In this circumstance there are no deference considerations that preclude adoption of a construction which most completely forwards the statute's purposes. For the reasons discussed previously in the text, with regard to Title VII that construction is one that views liability as established, and appropriate relief available, on a showing that a proscribed consideration was taken into account in the decisionmaking process.

causation in tort law.[15] Rather, it is now quite widely accepted: (a) that approaches to causation which depend upon answering hypothetical factual questions are to be avoided in favor of analyses that view what actually happened and ask only whether the defendant's conduct was a "substantial factor" in bringing about the injury; (b) that causation-in-fact issues cannot be determined in a policy vacuum, but must be considered with an eye toward the purposes of the substantive norm at issue, and particularly toward whether that norm was intended to avoid the *risk* of inflicting injury as well as to avoid the infliction of actual injury; and (c) that for various policy-related reasons it may be appropriate to transfer the burden of proving traditional but-for causation from the plaintiff to the defendant.

(a) While the United States derives its "sufficient cause" concept from a few fairly recent tort law commentaries, that concept is in fact both narrower and differently focussed than the concept most commonly accepted today.[16] Thus, the most widely read text on torts recognizes (albeit grudgingly) that

[15] The discussion of causation concepts in the brief for the United States is excellent and accurate as far as it goes. We therefore take that discussion as a departure point and show in the text that the "sufficient cause'" concept the government suggests is much narrower than the causation concepts current in tort law today.

One point bears noting in this regard: It is far from clear that tort law causation concepts are an appropriate analogy in the present context. And, in fact, in developing the law in the other substantive areas that turn upon the motive with which an employer or government took detrimental action, this Court has not generally reasoned on the basis of common law tort causation concepts. In the end, we believe reasoning of the kind presented heretofore in this brief, based upon the particular statutory scheme and taking into account the particular role of human motivation in decisionmaking, is more pertinent than common law ideas of causation.

[16] The suggestion at one point in the United States' brief that the "sufficient" cause concept is the one applied by this Court in

> a broader rule [than the "but for" rule] . . . has found general acceptance. The defendant's conduct is a cause of the event if it was a material and substantial element in bringing it about. . . . It has been considered that "substantial factor" is a phrase sufficiently intelligible to furnish an adequate guide . . . and that it is neither possible nor desirable to reduce it to any lower terms. [W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on The Law of Torts* 267 (5th Ed. 1984)].[17]

Mt. Healthy and *Transportation Management* (Gov. Br. at 21) is mistaken.

In the first place, in those cases the Court concerned itself with describing the constitutional or statutory violation in terms of what *actually* motivated the employer; that, presumably, is why the term "motivating factor" was used in both cases, to describe a factor that was in fact one of the actor's motives. The government's analysis, in contrast, requires determination of hypothetical issues concerning whether a legitimate motive would have been "sufficient" to cause the injury in question had the illicit motive not played a role in the decision.

Moreover, nothing in *Mt. Healthy* or *Transportation Management* (or any other of this Court's relevant cases) purport to set a threshold that excludes from the liability determination factors that, in this case, were "significant" in the decisionmaking process, but may have been neither necessary nor sufficient to the decision standing alone. Rather, as we have demonstrated, a constitutional violation on the one hand, or an unfair labor practice on the other, can be made out simply by showing that an impermissible motive played a significant role in the decisionmaking process; necessity or sufficiency becomes relevant at the remedy stage, if at all.

[17] *See*, for the seminal articles from which this now-dominant approach was derived, Malone, *Ruminations on Cause-in-Fact*, 9 Stan. L. Rev. 60 (1956); Green, *The Casual Relation Issue*, 60 Mich. L. Rev. 543 (1962).

Malone, for example, argues at some length that there is no judicial support for the proposition that the "substantial factor" test should be limited to situations in which "the force set in motion by the defendant would have been sufficient to produce the damage alone". Malone, 9 Stan. L. Rev. at 90-91:

> It is difficult to appreciate how the limitation in question serves any purpose of administration or policy. . . . [For example], [i]f the fire started by plaintiff was sizeable and merges with another fire, why must the court require the jury to make an estimate at plaintiff's risk as to whether defendant's fire would have worked the same destruction unaided? If the flames he caused to be put in motion were actively playing a part, is it not enough to inquire whether that part was sufficient to warrant an imposition of liability? This can be adequately expressed through the use of the term "substantial". . . . No further safeguard is needed. [*Id.*]

This approach avoids—and in large measure is deemed superior to the alternatives on the ground of avoiding—the hypothetical, counter-to-fact nature of the "but for" and "sufficient" cause approaches, in which the trier of fact "is invited to make an estimate concerning facts that concededly never existed." Malone, *supra*, 9 Stan. L. Rev. at 67; see also W. Keeton et al., *supra*, at 265.

(b) The "substantial factor" formulation was developed, in large part, in recognition of the proposition that "in the law 'cause in fact' (as it was once called), like proximate cause, is in the end a functional concept designed to achieve human goals." Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. Chi. L. Rev. 69, 107 (1975). In particular, the "substantial factor" formulation permits factfinders to adjust the tightness of the required relationship between the defendant's conduct and the plaintiff's injury to reflect the strength and the nature of the policy expressed in the relevant legal rule. *See Malone, supra*, 9 Stan. L. Rev. at 91 & *passim*. As such, the "substanital factor" approach reflects a broader recognition that cause concepts cannot be articulated in a policy vacuum:

> The question in a particular case as to whether the relationship between the defendant's conduct and the plaintiff's harm is close enough to warrant application of the pertinent rule of law requires the court to determine whether the rule was designed to protect against the type of injury suffered by the plaintiff. This answer is influenced by the court's reading

> of how "exacting" or strict the rule of law is. Moreover, where the defendant's act is intentional rather than negligent, the courts are apt to be satisfied with a relationship more tenuous than one they would otherwise require. The willingness of courts in the tort area to view 'cause-in-fact' from a goal oriented perspective and to shape it to respond to changing social needs is reflected in myriad decisions, ranging from the well-known *Summers v. Tice* 33 Cal. 2d 80, 199 P.2d 1 (1948) to recent developments in the products liability field fashioning novel theories of enterprise and market share liability to provide recoveries not contemplated by traditional causation doctrine. [Brodin, *supra*, 82 Col L. Rev. at 313-14.]

Of particular relevance here is the stress in the recent tort case law on identifying the risk to which the defendant's actions improperly exposed the plaintiff, and adjusting the causation concept (as we argue above should be done under Title VII) to that risk.[18]

(c) As one of the ways of adjusting causation concepts to the legal rule's underlying policy, courts in tort cases have altered the ordinary burden of proof as to causation. For example, *Summers v. Tice*, 33 Cal. 2d 80 (1948) involved a situation in which there were two negligent gunmen, each of whom shot at the plaintiff. Because of the difficulty in establishing which gun fired the wounding bullet, the court placed on each defendant the responsibility of proving that he was *not* the respon-

[18] Perhaps the most noteworthy examples of this approach are the "chance of life" cases, in which the defendant's actions reduced the chance that a plaintiff would survive when those chances were already less than fifty percent. Rather than asking, as a "but for" approach would, whether absent the defendant's negligence, the plaintiff would more likely than not have survived, several courts have viewed the increased risk of harm due to defendant's conduct as sufficient to demonstrate that the defendant's negligence was a "substantial factor" in causing the plaintiff's death. *E.g., Herskovits v. Group Health Insurance*, 664 P. 2d 474 (Wash. 1983); *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966).

sible gunman. This is just one of several examples in which recent tort decisions shifted the burden of proof on causation to the defendant because of the unfairness, for various reasons, of placing that burden on the plaintiff. *See also, e.g., Haft v. Lone Palm Hotel*, 3 Cal. 3d 756 (1970); *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37 *cert. denied* 469 U.S. 826 (1984).[19]

[19] Thus, even if it were *not* true, as we argue above, that the *Mt. Healthy/Transportation Management* approach is best viewed as shifting the burden of persuasion on causation only after liability is established, there is no insurmountable common law barrier to shifting the burden to the defendant at the liability stage for many of the same policy reasons that justify, in our view, regarding the cause of action to be established without demonstrating an effect upon a particular employment decision. *See Transportation Management, supra*, 462 U.S. at 403 ("The employer is a wrongdoer; he acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.").

It is worth noting as well that there is yet one more approach to the mixed motive causation problem that yields basically the same result argued for in the text. That approach views the problem as presenting a harmless error issue, in the same sense that complaints about the bias of an administrative or judicial factfinder, or reliance on impermissible evidence, raises such an issue. *Cf. Johnson v. Reed*, 609 F.2d 784 (5th Cir. 1980).

Where harmless error issues are raised, whether in criminal or civil law, the placing of the burden of proof and the standard of proof applied depends primarily on the nature of the procedural violation; the stronger the norm violated, the more likely it is that the burden of proving harmless error will be placed upon the party seeking to preserve the tainted result. *See Chapman v. California*, 386 U.S. 18, 23 (1967); *United States v. Argentine*, 814 F.2d 783 (1st Cir. 1987); *Haddad v. Lockheed California Corp.*, 720 F.2d 1454 (9th Cir. 1983) and cases cited; *Price Bros. Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 446 (6th Cir. 1980); *cf. McCandless v. United States*, 298 U.S. 342 (1936).

In this instance, as we have seen, the very premise of Title VII is that sex-based or race-based decisionmaking is fundamentally unfair to the individuals affected and socially destructive. Under

The upshot of the foregoing foray into tort law is not that this Court, in this case or any other, should attempt to model the Title VII law of causation on the latest tort law analysis. Rather, the point is that contemporary tort law does *not* take the rigid approach to cause issues suggested by either Price Waterhouse or by the United States, but instead develops doctrine in response to the very sorts of considerations we argued earlier are pertinent under Title VII. And modern tort doctrine supports the conclusion implicit in Title VII itself: The essentials of a cause of action under Title VII can be established in a mixed motive situation by showing that sex or some other proscribed consideration played a negative role in the decisionmaking process concerning a term, condition, or privilege of employment. Whether or not that adverse effect was enough to make a difference as to a *particular* employment decision is a question going to remedy and not to liability.

V. The Title VII Burden of Proof Issues Presented Here

As we have seen, this Court in *Mt. Healthy* created, and in *Transportation Management* approved, rules which allow a defendant who has committed a wrong to demonstrate that the wrong does not warrant certain relief. At the same time, those two cases explicitly approve *placing the burden of persuasion on the defendant who endeavors to take advantage of the opportunity to avoid remedial relief. Mt. Healthy*, 429 U.S. at 287; *Transportation Management*, 462 U.S. at 403. In effect, the Court shifted to the defendant the very real risk that

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those circumstances, it appears that shifting the burden of persuasion to the defendant to prove, convincingly, that the defect in the decisionmaking process was harmless would be justified, and that in the absence of such proof the decision actually made could not stand. In other words, the result should be the same as it would be if a party were attempting to void the results of a decision made by a judge proven to have taken race into account in reaching his or her decision.

it will be difficult to persuade a trier of fact as to what would have happened if what actually happened had not happened.

The Court has concluded, in other word. that the wrongdoer seeking to escape providing the plaintiff relief must at least "bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946); *see also Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931); *NLRB v. Remington Rand, Inc.*, 94 F.2d 862 (2d Cir.) (L. Hand, J.), *cert. denied*, 304 U.S. 576 (1938). This uncertainty, it bears noting, is considerably greater where, as in these cases, human motivation rather than physical causation is in question; while physical occurrences tend to follow rules of cause and effect that are at least theoretically ascertainable, the same cannot be said of the complexities of human thought and behavior.

There is, in all these regards, no basis for distinguishing the situation under the Constitution and the NLRA from that under Title VII.[20] The court of appeals decision in this case, however, could be said to go beyond the language of *Mt. Healthy* and of *Transportation Management* in one respect: the court below held that a clear and convincing standard of evidence applies.

We submit that, however the requirement is phrased, in this species of cases, the burden of persuasion imposed should be sufficient to assure *as a practical matter* that

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[20] The suggestion by the United States (Gov. Br. at 23) that such a defense is mandated by § 706(g) of Title VII is surely in error. The part of § 706(g) forbidding affirmative relief and back pay if the employment decision was "for any reason other than discrimination" is modelled on § 10(c) of the NLRA. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 n.11 (1975). And the parallel language in § 10(c) was construed in *Transportation Management* as "not meant to apply to cases in which both legitimate and illegitimate causes contributed to the discharge. . . ." 462 U.S. at 401 n.6.

the risk of uncertainty is born by the wrongdoer. That, for example, is the NLRB's practice.

Thus, the Board requires that the evidence presented by the employer to prove that the same decision would have been made through untainted decision-making must be more than simply testimonial attestations as to what would have been done absent a discriminatory motive. *See McLane/Western, Inc. v. NLRB*, 827 F.2d 1423, 1425 (10th Cir. 1987); *NLRB v. Searle Auto Glass, Inc.*, 762 F.2d 769, 774 (9th Cir. 1985); *NLRB v. Horizon Air Services, Inc.*, 761 F.2d 22, 27 (1st Cir. 1985); *NLRB v. Townsend and Bottum, Inc.*, 722 F.2d 297, 302 (6th Cir. 1983). Similarly, where it is an established policy that is relied upon to prove what would have happened in the absence of a discriminatory motive, the Board has generally required clear evidence that the policy existed, that the policy applied to the situation at hand, and, as well, that the policy was strictly and uniformly enforced. *McLane/Western, Inc. v. NLRB, supra*, 827 F.2d at 1425 & n.5; *Airborne Freight Corp. v. NLRB*, 728 F.2d 357, 358 (6th Cir. 1984); *A&T Manufacturing Co.*, 276 NLRB 1183 (1985); *PYA/Monarch, Inc.*, 275 NLRB 1194 (1985).

The "clear and convincing evidence" rubric used by the court of appeals seems as well adapted as any other to convey the standard that these cases actually apply, and quite properly so. That standard focusses directly on the two relevant factors in reducing the risk of uncertainty created by the employer's unlawful acts: the type of evidence presented ("clear" rather than ambiguous) and the degree of certainty that evidence conveys ("convincing" rather than equivocal). Where, as here, the appropriate alternative would be not a lower standard of proof but eliminating the counter-to-fact proof altogether, the defendant is in no position to complain. *See also Albemarle Paper Co. v. Moody*, 422 U.S. 421 (backpay should be denied under Title VII "only for reasons which, if applied

generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.").

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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